UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

DICKENS, INC.

and	**Case Nos.**	**29-CA-29080**
		29-CA-29198
WENQUING LIN, an Individual		**29-CA-29254**

Henry Powell Esq. Counsel for the
General Counsel
James Chou, for the Respondent

SUPPLEMENTAL DECISION

Raymond P. Green, Administrative Law Judge. On June 10, 2010, the Board, at 355 NLRB No. 44, issued a Decision that remanded certain matters for further consideration. In pertinent part, the Board stated that it agreed that the General Counsel showed that Lin's and Wu's protected activity was a substantial or motivating factor in the Respondent's decision to select them for layoff and that the burden of proof shifted to the Respondent to prove that it would have taken the same action even absent their protected activity. However, the Board concluded that I did not sufficiently consider whether the Respondent had met its burden of sustaining its contention that it "selected Lin and Wu for layoff at least in part because of their lack of facility in English…"

In conclude that the Respondent has not met its burden for the following reasons:

1. In my opinion, Mr. Chou's testimony was not credible. Although he was given the opportunity to testify as to the reasons for his decision to lay off the two discriminates, his testimony was so marred by incoherence and irrelevancies that I do rely on it for any purpose.

2. By a letter to the NLRB's Regional Office dated December 29, 2008,[1] Chou reviewed his experiences in the prior case and responded to new unfair labor practice charges that had been filed. Among other things, he attached a letter to the Regional Office dated June 20, 2008 where he asserted that because business was down, he was going to have to reduce his work force in the warehouse. Chou stated *inter alia*:

> As shown on the attached list, currently we have 15 people working in the warehouse and we are planning to cut down at least 6 people immediately. Based on employee performance and the company's need, Mr. Wenquing Lin and Ms. Miaona Wu are in the list to be laid off and they are involved in a pending case with the NLRB.

[1] This is Respondent Exhibit 2. This is a letter explaining his position to the Regional Office and contains a large number of attachments.

> Please let us know if we are not allowed to lay off Mr. Lin or Ms. Wu. We are also more than happy to meet you to answer your questions. We have had enough problems with the NLRB and we are not looking for extra troubles.

As an attachment to a letter sent to the Regional Director dated October 16, 2008, Chou submitted a spreadsheet, listing all of his warehouse employees, setting forth their job duties and his opinion of their performance. Wu was ranked in this chart as the lowest performing employee.

Respondent Exhibit 2, consisting of multiple e-mails and letters, (with attachments), between Chou and personnel in the Brooklyn Regional Office are out-of-court statements and therefore constitute hearsay for the truth of the matters asserted, if offered for that purpose by the Respondent. This exhibit was received in evidence, in part, because Chou wanted to demonstrate his alleged persecution by the Regional Office and it was easier to receive the documents than to fight him on an evidentiary issue that he did not understand. The bottom line is that the letters, e-mails and attached documents that were submitted by Chou to Region 29 in the course of the investigation are not substitutes for actual evidence that must be presented in any subsequent trial. Any assertions made by Chou in these letters and attached documents do not constitute competent evidence in support of his contention that Wu and Lin were laid off or terminated for good cause. And in this connection, I specifically advised Chou that when he gave his testimony, he should testify as to the reasons why he laid off Wu and Lin.

3. Although Chou testified under oath, without interruption by either the General Counsel or me for four hours, he never once stated during his testimony that the reason he chose Lin or Wu for layoff was because they had difficulty with the English language. In fact, he didn't even describe any reasons why he laid off either individual.

4. The fact that Wu conceded that Chou told her on the day of her layoff that he had selected her because she could not speak English and because she was the highest paid employee, does not prove that this was the actual reason Chou selected her for a layoff. Wu also testified that when he said this, she stated that she never had any trouble doing her work and that he remained silent when confronted with her response. Although her testimony as to what Chou said to her at the time of her layoff should be considered as evidence regarding the issue, it is still up to the Respondent to establish, by competent evidence including testimony under oath, that this was in fact the reason and not simply a statement made by Chou to set up a pretext.

5. In the prior case involving this Respondent, at 352 NLRB 667, (2008), the Respondent made essentially the same contention with respect to the previous discharge of Lin. This was rejected by the Administrative Law Judge and the Board. The ALJ concluded:

> Chou also testified that part of his decision was "cost savings, " inasmuch as Lin cannot lift heavy boxes and did not speak English and Chou could hire college students at $8 per hour who could speak English and were capable of lifting heavy boxes…. I note that Liu and Wu had higher salaries than Lin and also speak limited English. More importantly, Respondent could have enjoyed cost saving at any time, by hiring more college students and terminating Lin, but it did not do so until Lin engaged unprotected conduct on September 29. In my view, it is clear that Lin's protected conduct was the sole and only reason for Respondent's decision to terminate him. In any event, it is even clear that Respondent has failed to show that it would have discharged Lin absent his protected concerted activity…

6. The evidence here established that both Lin and Wu had been performing their work for many years and that their limited skills in English did not impede their work. (Wu had been employed in the warehouse since September 2000).

For all of the reasons described above, I conclude that the Respondent has not met its burden of establishing that it would have terminated or laid off Lin or Wu for any reason apart from their protected concerted activities. In the case of Wu, I also conclude that her termination was motivated by her participation in an NLRB proceeding and that the Respondent has not met its burden of showing that it would have laid her off for any other reason. I therefore reaffirm my previous decision that the Respondent violated Section 8(a)(1) of the Act by laying off Lin and violated Section 8(a)(1) and (4) of the Act by laying off Wu.

Dated, Washington, D.C., July 16, 2010.

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Raymond P. Green
Administrative Law Judge